WILTSHIRE & GRANNIS LLP

April 12, 2010

Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

RE: *Petition of Telcordia Technologies, Inc. to Reform Amendment 57 and to Order a Competitive Bidding Process for Number Portability Administration,* and *Petition of Telcordia Technologies, Inc. to Reform or Strike Amendment 70, to Institute a Competitive Bidding for Number Portability Administration, and to End the LLC's Interim Role in Number Portability Administration Contract Management*, WC Docket Nos. 07-149 and 09-109

Dear Ms. Dortch:

Telcordia Technologies, Inc. ("Telcordia") hereby responds to the "sky is falling" claims and assertions contained in the North American Portability Management LLC's ("NAPM LLC" or "NAPM") March 22, 2010 ex parte filing. In its filing, NAPM offers an empty promise that it intends to issue a Request for Proposal ("RFP") for the NPAC database administrator in May or December 2010 – for a contract that would not begin until 2016. Notably absent is any commitment to select providers on the basis of a truly competitive RFP or to select multiple NPAC vendors, or even a commitment not to enter into yet another exclusive, sole-source contract or contract extension.

NAPM further asserts that granting Telcordia's petition would require "immediate wholesale dismantling of the current system" and "introduce chaos." Not so. Demanding actual accountability and policymaking by duly appointed policymakers will hardly introduce chaos. It is, in fact, the governance structure used for both the NANPA and Pooling Administrator contracts. The FCC easily could adopt such a governance structure from those contracts, either as-is or modified for the NPAC. If it did so, the FCC and the NANC would approve Statements of Work (with pricing as it is done for NANPA and Number Pooling), which NAPM then would implement.[1] NAPM's apparent belief that it, rather than the FCC, should determine whether

[1] For the Universal Service Fund, the USAC uses the FCC and the federal procurement portal, FedBizOpps.org, to competitively bid its services contracts. *See, e.g.*, USAC RFP for IPIA

future administrators will be selected by competitive bid and whether there should be more than one administrator is by itself disturbing, and underscores the extent to which NAPM has arrogated policymaking functions to itself. Moreover, far from seeking chaos, Telcordia has suggested maintaining the *current* NPAC pricing and administrator until competitive bidding can be completed – just as occurs in analogous situations when contract awards are overturned as a result of a successful bid protest.

NAPM also asserts that it has represented carriers' interests effectively, and that carriers and consumers share common interests. But carrier and consumer interests are not identical because many carriers can recover LNP costs from consumers through surcharges. When costs can be recovered through surcharges or regulatory fee line items that do not affect the rates around which services are marketed, carriers' incentives to constrain costs are diluted. Consumers, however, will still bear the full brunt of any inflated costs. Thus, it remains the Commission's role to ensure that the contracts for the Administrator that it appoints and whose fees are collected according to its rules are cost effective. Moreover, the Commission's authority to appoint Administrators – which necessarily must also include the power to remove or add to them – gives it full authority to reestablish its policymaking role and oversight.

Despite NAPM's Chicken Little-like claims, granting Telcordia's petition will not cause the sky to fall and adds no facts to the record that should delay a Commission decision. Simply put, what NAPM seeks is to maintain the status quo of noncompetitive business as usual with effectively zero accountability to regulators or the public, and no pre-effectiveness transparency or review of important policy decisions. Telcordia, in contrast, seeks market competition, transparency, accountability and oversight.

1. Telcordia's Request Specifically Avoids Disruption during Transition to Competition.

Telcordia requests, as it has done throughout this process, that the Federal Communications Commission ("FCC") take back the reins after more than a dozen years and conduct a new, competitive bid for the congressionally mandated number portability contract that could be implemented before 2016. Telcordia has not argued that the Commission should not consider factors other than price. Rather, Telcordia argues that the Commission should be seeking the best combination of price, quality and all other relevant factors – which can best be accomplished through competitive bids. And Telcordia notes that since the initial selections were made in 1997, vendors never have had an opportunity to compete head-to-head on all of these points. This provides yet another reason why number portability administration should be subject to immediate competitive bidding, and why a multivendor environment is preferable to today's single vendor structure. If the Commission determines that the public interest would be served by maintaining some provisions of the number portability contract during the period while competitive bidding is conducted, it has full authority to tailor relief to meet the needs for

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Assessment Program Services, https://www.fbo.gov/index?s=opportunity&mode=form&id=b64acb433e11fca75cd0980b9ea11de9&tab=core&_cview=0 (Apr. 7, 2010).

number portability database administration with the current vendor on an interim basis. Once new contracts are in place, the existing contract would be terminated.

2. Telcordia Seeks Accountability in Number Portability Contracting Decisions.

Telcordia believes that NAPM should be accountable to the public, via the Commission and NANC. The best way to do that is to have some form of pre-effectiveness NANC and FCC review *before* a NAPM contract amendment can become effective – and to require FCC approval of cardinal changes. NAPM today does not seek policy guidance from the FCC or from NANC prior to making major, binding contractual decisions that alter fundamental contractual terms. Instead, it takes binding actions without providing any opportunity for public review or comment by either the full NANC or the FCC. NAPM repeatedly has presented substantive contract amendments containing cardinal changes to the contract's terms as *faits accomplis.* Further insulating their actions even from after-the-fact review, NAPM and NeuStar have included an "inseverability" clause that prevents the FCC from modifying the contract for any reason – including voiding provisions for violations of FCC rules or public policy – without tripping the "nuclear option" and invalidating the entire contract amendment. NAPM's assertion that granting Telcordia's request would "resurrect[] the 2002 version of the agreement and lock[] the terms in place" illustrates precisely this point.[2] Of course, the Commission need not be bound such attempts to tie its hands, which should be void as a matter of public policy, just as the FCC has declared broadcast non-compete agreements that constrain a licensee's ability change formats to violate FCC rules regarding licensee control.[3]

NAPM defends the status quo by contending that it represents carriers' interests effectively. While that claim itself is debatable – inasmuch as NAPM represents only its members, who are themselves a small subset of all carriers and who have disagreed amongst themselves with respect to these contracts[4] – NAPM's interests will not fully protect consumers from unreasonably high number portability charges. Consumers ultimately pay the bill; many carriers pass number portability administration charges on to consumers as "regulatory service fees" on their monthly bill. These surcharges dilute carriers' incentives to fully police NeuStar's charges. It thus must fall to the Commission to ensure that the full spectrum of the public interest, including consumers' interests, is safeguarded when fundamental decisions are made regarding number portability administrations contracts. That cannot happen when NAPM presents major contract amendments only after the fact, with no notice or opportunity for FCC input and public comment.

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[2] NAPM's contention in its March 22, 2010 ex parte refutes its prior claim that the inseverability clause was just an "acknowledgment" of the FCC's regulatory authority, not a constraint on the Commission. *See, e.g.*, Comments of North American Portability Management LLC, WC Docket Nos. 07-149 and 09-109, at 6-7 (filed Sept. 8, 2009).

[3] *See e.g., In re Mid-Atlantic Network, Inc. and Centennial Licensing II, LLC*, Notice of Apparent Liability, 23 FCC Rcd. 7582, 7589-90 ¶¶13-15 (May 8, 2008).

[4] *See, e.g.*, Comments of Comcast Corp., WC Docket Nos. 07-149 and 09-109 (filed Sept. 8, 2009).

Further frustrating accountability, NAPM is not transparent. It does not make its meeting minutes or extracts of its minutes publicly available, not even to the federal advisory committee charged with monitoring its conduct.[5] Because it has not had to justify its decisions to policymakers before they take effect, it does not set forth any explanation for its decisions. Its decision-making process therefore is opaque and unreviewable. This kind of black-box decision-making lends itself all too easily to deals that do not serve the public interest. That is exactly what happened here. Demonstrating this point, NAPM itself never has come forward to present this Commission with documents demonstrating how it evaluated the unsolicited proposals it received in comparison with the contracts that it executed. Accountability and transparency must be reestablished, which can best be done by moving immediately to competitive bidding in a multivendor environment, with Commission oversight and approval of the bid evaluation and selection processes.

3. Public Policy Decisions Should Be Made by Public Officials.

Reinstating public policy decision-making by public officials, rather than by a private entity, and ensuring transparency and accountability in number portability administration contracting is sound policy and is wholly feasible. The structure successfully used for both NANPA and Number Pooling ensures transparent accountability and policy decision-making by public officials without being disruptive. Had NAPM provided NANC and the Commission with the opportunity to review its major contract amendments prior to having them take effect, parties such as consumer advocates, state regulators, or vendors would have had the opportunity to flag problematic provisions and the Commission could have taken corrective actions to ensure that number portability administration was being conducted in accordance with its policy objectives.

NAPM, however, seeks to continue arrogating policymaking power to itself. Even in its ex parte filing, NAPM claims that it gets to decide if there will be one vendor or multiple vendors, if adding new IP-based URI fields to the database satisfies Section 52.25 of the Commission's rules, and – in a breathtaking step that would further stifle oversight – if parties should be permitted to bring disputes before the Commission. But there is no reason why a more accountable structure that places policymaking in the hands of public officials is infeasible or undesirable here.

a. *Policymakers should decide how many vendors are appropriate.*

Determining whether a single vendor or multiple vendors should be selected to fulfill a contract is inherently a policymaking decision. Accordingly, it should fall to the FCC, as the policymaking body and the public's representative, to make that determination. Not NAPM. The FCC's policymaking authority and interest regarding number portability do not begin and end, as NAPM claims, with competitive neutrality. If such a claim were correct, which it is not, then the FCC would never care about things like price or security or redundancy or any of the

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[5] See Letter from Melvin Clay and Timothy Decker, Co-Chairs, NAPM LLC, to Thomas Koutsky, Chairman, North American Numbering Council, at 1 (Sept. 17, 2009) (attached).

myriad things it does care about.[6] But it should and it does. In addition to its concern about competitive neutrality, the FCC expressly stated its preference for multiple database administrators in the *Second LNP Order*. This decision, reflecting policy interests in achieving the best possible deal – in terms of price, certainly, but also in terms of services and system robustness – for consumers lies within the heart of FCC policymaking authority.

b. *Policymakers should decide when cardinal changes are needed.*

Cardinal changes to the number portability database contract, such as extensions of term or database functions and capabilities, are the province of the FCC. NAPM, however, suggests instead that because it previously has modified the Master Agreement "without FCC intervention," then the FCC has no role to play. In short, NAPM contends it should be allowed to continue making cardinal changes without policymaker approval simply because it did so in the past. Unsurprisingly, NAPM can provide no support for this astonishing assertion.

Prior database expansions, contrary to NAPM's claim, have resulted from Commission policy decisions.[7] Telcordia agrees with NAPM that the NPAC database has been expanded since its inception. But, prior to Amendments 70 and 72, each of those expansions occurred only *after* the FCC made a policy decision either not to harm existing services or to expand the scope of the NPAC to a new service. The FCC set the policy, and NANC and NAPM implemented it. This is the proper course, rather than NAPM's practice of making policy decisions subject to post-hoc objections only.

c. *Having policymakers decide policy issues is wholly feasible.*

The Commission's own processes with respect to the NANPA and Pooling Administration contracts show that it is possible to have structures that retain FCC decision-making with respect to fundamental contractual issues, while preserving the value of industry input. Moreover, to grant Telcordia the relief it seeks, the Commission need not overturn all

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6 *See*, *e.g.*, *In re Telephone Number Portability*, Second Report and Order, 12 FCC Rcd 12,281, 12,305 ¶ 36 (1997) ("*Second LNP Order*").

7 The FCC's decision to implement portability without degrading current wireline services led to the inclusion of the initial point code fields, The FCC's decision to require wireless and intermodal portability under the same degradation of service restrictions led to the inclusion of wireless point code fields. The FCC's decision ordering number pooling and approving the architecture suggested by the industry to leverage NPAC led to including data for number pooling. Notably, no commenter in those proceedings objected to such expansion. Even in these instances, however, neither the FCC nor NANC reviewed the contract amendments prior to execution, in violation of proper oversight procedure. In stark contrast even to the previously listed database expansions, NANC could reach no consensus on adding the various URI fields. The FCC never reached a decision. NAPM and NeuStar, however, proceeded to include the fields on their own initiative and simply presented this to NANC and the industry as a done deal.

elements of the current structure. The vast majority of contract amendments are uncontroversial. The contract amendments at issue here are those affecting the core structure, scope, term and price of the contract. And reestablishing FCC decision-making and pre-effectiveness approval for that small subset of contract decisions is feasible, and can follow the types of processes uses for the NANPA and Pooling Administration contracts.

4. Telcordia Seeks Market Competition.

Telcordia asks to be allowed simply to bid in an open and competitive bidding process on the number portability database administration contracts. Federal law requires open and competitive bidding for the NPAC contracts.[8] But even assuming it did not, Commission policy strongly favors competition as benefitting the public interest. Courts also have recognized the public's interest in "honest, open, and fair competition."[9] Telcordia believes the Commission, not NAPM, should decide if one vendor or multiple vendors should provide number portability database administration services.

NAPM, in contrast, offers only an empty promise of a possible RFP. Even its statements in the record are heavily qualified and hedged: It is "the *intent* of the NAPM LLC to *initiate* a[n RFP] process that *would enable* a new provider, *if selected*, to replace NeuStar at the *expiration* of the current contract in 2015." NAPM offers no explanation, other than protecting NeuStar's sweetheart monopoly deal, for why it needs five years to complete an RFP process. Nothing in NAPM's highly conditional statement offers any assurance that NAPM will not again enter a contract extension with NeuStar or a sole-source agreement. This would ignore all of the competition and other public policy concerns Telcordia has raised and give the incumbent a tremendous advantage over competitors. NAPM still refuses to commit not to engage in yet another sole-source, non-transparent, behind-closed-door contract extension with NeuStar before 2015.

NAPM goes still further, however, and suggests that a single-vendor market does not violate antitrust laws. That is a straw man argument that misses the point. The competition policy concern is the *method* used to select the NPAC database administrator. Specifically, Telcordia objects to the behind-closed-doors, secretive, after-the-fact presentation of the contract amendments in lieu of open and competitive bidding. NAPM and NeuStar's pattern of contract – and the terms of those contracts themselves – has foreclosed effective competition both in the market and for the market. Nor is the NPAC a "natural" monopoly. A look at the FCC's concerns as number portability took effect starkly contradicts NAPM's contentions that a single-vendor market of nationwide scope is competitive or in carriers' and consumers' best interests. In fact, the initial local number portability market included seven regional LLCs, who entered contracts with two different providers. This reflected the Commission's belief that "[h]aving multiple database administrators . . . should enable carriers to obtain *more favorable terms and*

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8 *See* Ex Parte Reply of Telcordia Technologies, Inc. to the Ex Parte Response of NeuStar, Inc., WC Docket Nos. 07-149 and 09-109, at 16-35 (filed Feb. 16, 2010).

9 *Magellan Corp. v. United States*, 27 Fed. Cl. 446, 448 (1993).

conditions than if only one database administrator had been selected."[10] NeuStar initially became a monopolist by default when Perot Systems was unable to fulfill its contract obligations.

What led to the initiation of Telcordia's series of petitions to the FCC was the fact that rather than soliciting competitive bids for either a multivendor or regional structure in which there would be the opportunity for entities other than NeuStar to compete openly to be NPAC Administrators in all or part of the country, NAPM and NeuStar executed Amendment 57, which both extended NeuStar's contract term through 2015 and instituted contractual penalties against competitive bidding prior to 2012. NAPM and NeuStar then, in Amendment 70, swapped out the contractual penalties against competitive bidding that would have expired in 2012 with no minimum guarantees to NeuStar for 2013-2015, for a contract pricing structure that *de facto* ensures that there can be no competitive entry before the end of 2015. The reality is that these behind-closed-door actions have foreclosed any competition and entry into NPAC administration prior to the end of 2015. And NAPM has made no commitment that this will not happen again, even if it eventually does issue an RFP.

In its ex parte, NAPM assumes that NeuStar intends to invoke the inseverability clause's "nuclear" effect and bill carriers retroactively to January 1, 2009, for Amendment 70, and September 21, 2006, for Amendment 57, if the present contract is modified or deemed invalid. NeuStar should state if this is not the case or if it in fact intends to hold this clause over the Commission's, the carriers' and the public's heads. If so, for 2009 transactions alone, NeuStar would demand $50 million from carriers,[11] charges that carriers likely would seek to recoup from consumers. Such a demand would starkly illustrate the "competition penalty" Telcordia has highlighted throughout this proceeding.

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In summary, Telcordia seeks FCC and NANC guidance and oversight of the NPAC database administration, just as in number pooling. Telcordia also seeks an open and competitive bidding process for the NPAC database administrator in order to strengthen the local number portability by providing diversity and redundancy in the system, and price and service level competition. For all of these reasons, and because there has been no practical oversight or competition in this Congressionally mandated program for more than a dozen years and this issue has been directly raised before Commission for more than two years now; Telcordia urges the Commission to act now to reinstate competitive bidding and bring open, transparent accountability to its number portability program.

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[10] *Second LNP Order*, 12 FCC Rcd. at 12,305 ¶ 36 (emphasis added).

[11] Reply Comments of Telcordia Technologies, Inc., WC Docket Nos. 07-149 and 09-109, at 16 (filed Sept. 29, 2009).

A copy of this letter is being filed in the above-captioned dockets.

Sincerely,

/s/ John T. Nakahata
John T. Nakahata
Madeleine V. Findley
Counsel to Telcordia Technologies, Inc.

Attachment 1

NAPM
NORTH AMERICAN PORTABILITY MANAGEMENT, LLC

North American Portability Management, LLC

September 17, 2009

Thomas M. Koutsky
Chairman, North American Numbering Counsel
5335 Wisconsin Avenue, NW, Suite 440
Washington, DC 20015-2034

Chairman Koutsky,

At the July 16, 2009 NANC meeting, as part of the report of the NAPM LLC, I reported that Amendments 62 and 70 both were approved by the requisite Supermajority Approval of the Members of the NAPM LLC (that is, approval of at least 75% of the Members present at a meeting at which a quorum is present), but were not unanimously approved. I was asked by a NANC representative what the "minority position" was with respect to these two Amendments. At the time, I was unable to recall the details of those "minority positions." I offered to refresh my memory by consulting the minutes of the meetings of the Members of the NAPM LLC at which those discussions occurred, and I agreed to provide a response after I consulted the minutes.

I have now consulted the minutes of the meeting of the Members that occurred on July 10, 2008, with respect to Amendment No. 62, and the minutes of the meeting of the Members that occurred on January 16, 2009, with respect to Amendment No. 70. Under the terms of the "Operating Agreement" of the NAPM LLC, Section 5.14.2, the minutes of the meetings of the Members cannot be published, released to, or made accessible for inspection by, the public or non-Members, except upon a written request for release and upon a Majority Approval, and then, subject to applicable attorney-client privileges, attorney work product privileges and restrictions regarding Confidential Information (as described in the Operating Agreement). Therefore, I cannot simply provide copies of those minutes or extracts from those minutes. In addition, the NAPM LLC has never published or released minutes of meetings during non-public or closed portions of the meetings in the past, because the Members of the NAPM LLC believe that such publication or release could "chill" or reduce the free, full and robust exchange of views and the debate that occur at the meetings.

Nonetheless, in an attempt fully to respond to the questions regarding the "minority position" with respect to Amendments No. 62 and 70, the Member Company who held and expressed that "minority position," has consented to my disclosure of that position in summary form in response to those questions. Accordingly, the following is my summary of the minority position expressed with respect to approval of Amendments No 62 and 70.

Please also be aware that it is not unusual for actions of the NAPM LLC not to be unanimous. Nonetheless, despite lack of unanimity, the processes and procedures of the NAPM LLC consistently are followed to allow full and fair debate and discussion, and were followed with respect to discussion and approval of Amendments No. 62 and 70. No Member of the NAPM LLC has expressed any objection to those processes and procedures or has raised any concern or question regarding their ability to participate in that process and in those procedures.

SOW 62: NUE - (NPAC / SMS - Contractor as a User)

The Member Company that disagreed with Amendment 62 stated that voting to adopt Amendment 62 would give NeuStar the ability to leverage the NPAC platform, as well as all future enhancement of that platform, for commercial gain. They felt this would give NeuStar an unfair competitive advantage being both the NPAC data administrator and user. In addition the Member Company voiced concern that the definition of call routing that was drafted only for Amendment 62 was overly expansive and allowed URI capabilities to the NPAC platform which they state was not intended to support that routing functionality.

SOW 70: Pricing Amendment - (Modifications to Exhibit E Pricing Schedules)

The dissenting Member Company acknowledged that the fixed price model provided the benefit of pricing improvement and the elimination of key triggers in SOW 57 that would allow issuance of an RFP prior to 2012, but did not feel the fixed price model was the right thing for the industry to do at the time for the following reasons:

- TN incentives give NSR [NeuStar, the current vendor] the upper hand in potentially undermining nascent ENUM development;
- The deal creates a framework for NSR to build a super-LERG;
- The incentives to add URI fields are inconsistent with the NPAC platform charter to support porting of voice telephone numbers.

All of these reasons would seem to add up a conflict of interest for the LLC, as well as potentially higher legal costs to defend against any actions.

Secondly, the industry will be assuming downside risk if volumes drop, thereby creating a disincentive to the industry to introduce competition for NPAC services.

The assumption of downside risk is also contrary to the initial guidance provided to VPAC by the LLC.

Lastly, the Member Company believed the urgency to complete the agreement in such an abbreviated time frame served the best interests of NSR, rather than the industry.

The content of this letter should answer the NANC representative's question on what the "minority position" was with respect to Amendments No. 62 and 70. If there are questions please forward them to the NAPM LLC Co-Chairs, Tim Decker and Mel Clay.

Sincerely,

Melvin Clay

Melvin Clay
Co-Chair
North American Portability Management LLC

TIMOTHY DECKER

Timothy Decker
Co-Chair